## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

DONNA DORSEY DAVIS, as an individual and derivatively upon

Plaintiff.

behalf of I-65 Properties, Inc.,

Case No. 2:06-cv-766-MHT VS.

RICHARD M. DORSEY, as an individual and CD&O, LLC, as a necessary party,

Defendants.

## DEFENDANTS' MEMORANDUM BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COME Now Richard M. Dorsey and CD&O, LLC, Defendants in the above-styled cause, and submit the following Memorandum Brief in Opposition to Plaintiff's Motion for Summary Judgment.

#### DEFENDANTS' MOTION TO STRIKE I.

Contemporaneous with the filing of this opposition brief, Defendants have filed a brief in support of their previously filed Motion to Strike. Defendants strenuously object to Davis being permitted to file her *Motion for Summary Judgment*, out of time and without seeking leave of court. By the filing of the instant brief, Defendants do not intend to waive their arguments contained in said motion to strike. However, because the Court ordered that briefs be submitted on the *Motion* to Strike and Plaintiff's Motion for Summary Judgment on the same day, Defendants accordingly comply therewith.

### II. ALA. CODE §7-3-118(B)

Davis asserts that the subject promissory note is barred by the statute of limitations pursuant to Ala. Code §7-3-118(b). That statute provides as follows:

> Note payable on demand. Except as provided in subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no

demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years.

Davis' argument regarding this statute is misplaced as she clearly ignores the language of the note in her attempt to bar recovery. (See Exhibit "3" - October 1, 1990 Promissory Note).1 Irrespective of the statutory language quoted above, this statute does not apply to the promissory note at issue because the note plainly and unequivocally waives the requirement for a demand. Accordingly, Davis' asserted defense is waived as evidenced by the language of the note.

The promissory note states in pertinent part as follows:

...[E]ach maker, endorser, surety and guarantor of this note severally waives demand, presentment, protest, notice of protest, suit and all other requirements necessary to hold them or any of them and they severally agree that time of payment may be extended or a renewal note taken or other indulgence granted without notice of, or consent to, such action, without release of liability of any such party.

(Emphasis added).

Ala. Code §7-1-306 provides that "[a] claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record." The above waiver is part of the contract and therefore said waiver contained within the instrument supercedes the limitations imposed by Ala. Code §7-3-118(b). It is well-settled that where certain terms are contained within the instrument, the terms are binding. See Little v. People's Bank of Mobile, 96 So. 763, 766 (Ala. 1923)(waiver contained in note is valid for stated purpose).

The terms of the note itself support Defendants' contention that this debt was not intended to comport to the requirements of a bank or other commercial lending company. The language

<sup>&</sup>lt;sup>1</sup>All exhibits referenced herein have been previously filed with *Defendants' Motion for* Summary Judgment. However, for the convenience of the Court, Defendants refile the exhibits referred to in the instant brief with the same exhibit numbers previously assigned.

suggests the unique situation that often exists in a closely held family corporation. The flexibility of the demand requirements (as well as other requirements) worked to the benefit of Davis as the note could remain unpaid for several years until the company realized a profit. Davis now seeks to take advantage of the very structure which permitted her to enjoy the benefit of the property absent any responsibility for seventeen years. Again, the parties were aware of the debt from the inception of the note. Further, as evidenced by the correspondence in 2000, Davis was interested in refinancing the debt. To now suggest that the debt was stale or was within months of being stale is disingenuous as best. We adopt and incorporate herein the additional factual assertions made in *Defendants' Motion for Summary Judgment*.

## III. DAMAGES OUTSIDE PROMISSORY NOTE

In the alternative, to the extent that the note may be unenforceable, Davis' summary judgment is still due to be denied. Davis' argument wrongfully assumes that the entire amount claimed is for the promissory note. On the contrary, as established in Dorsey's counterclaim, the corporation—of which Davis is a 30% owner—has had expenses for matters outside the promissory note over the past seventeen years. To the extent Davis seeks the benefit of that ownership, so does she bear the responsibility. It is undisputed that Davis has failed to pay any portion of the maintenance, upkeep, taxes or other expenses associated with I-65 Properties. (Exhibit "2" - Deposition of Richard Dorsey p. 123 at lines 1-6, p. 156 at lines 10-22; Exhibit "1" - Deposition of Donna Dorsey Davis p. 129 at lines 11-14; Exhibit "15" - Compilation of Expenses Owed). That expense has been borne solely by Dorsey. (Exhibit "14" - Affidavit of Richard M. Dorsey; Davis Depo. p. 129 at lines 11-14).

Accordingly, Davis' Motion for Summary Judgment is due to be denied.

## IV. CONCLUSION

Wherefore the premises having been considered, the Defendants respectfully request the Court to grant the *Defendants' Motion for Summary Judgment* and deny *Plaintiff's Motion for Summary Judgment*.

Respectfully Submitted this 27<sup>th</sup> day of April, 2007.

RICHARD M. DORSEY, as an individual, and CD&O, LLC, as a necessary party,

/s/ Clifford W. Cleveland CLIFFORD W. CLEVELAND

OF COUNSEL: CLEVELAND & COLLEY, P.C. 744 East Main Street Prattville, AL 36067 (334) 365-1500 phone (334) 365-1601 fax

## **CERTIFICATE OF SERVICE**

I hereby certify that I have electronically filed the foregoing *Defendants' Memorandum Brief in Opposition to Plaintiffs' Motion for Summary Judgment* with the Clerk of the Court for the United States District Court, for the Middle District of Alabama, Northern Division, using the CM/ECF system which will send notification of such filing to Lindsay B. Erwin, Esquire (lindsayerwin@gmail.com) and James Edward Roberts, Esquire (attyjuris@aol.com) this the 27<sup>th</sup> day of April, 2007.

/s/ Clifford W. Cleveland OF COUNSEL

# EXHIBIT "1"

**Deposition of Donna Dorsey Davis** 

## ORIGINAL

1	IN THE UNITED STATES DISTRICT COURT
2	FOR THE MIDDLE DISTRICT OF ALABAMA
3	NORTHERN DIVISION
4	
5	
6	DONNA DORSEY DAVIS,
7	Plaintiff,
8	vs. CASE NO. 2:06CV766-MHT
9	RICHARD M. DAVIS, etc.,
10	and CD&O, LLC, etc.,
11	Defendants.
12	
13	
14	* * * * * * * *
15	DEPOSITION OF DONNA DORSEY DAVIS, taken
16	pursuant to stipulation and agreement before Dee
17	Coker, Registered Professional Reporter and
18	Commissioner for the State of Alabama at Large,
19	in the Law Offices of Cleveland & Colley, 744
20	East Main Street, Prattville, Alabama, on
21	Tuesday, March 13, 2007, commencing at
22	approximately 9:15 a.m.
23	* * * * * * * * *

DUNN, KING & ASSOCIATES

Montgomery, Alabama

(224) 262-0261 - (200) 250 2001

1		never been just clear from the beginning.
2 '	Q.	Do you have any idea of the cost that would
3		be associated
. 4	A.	I don't, no.
5	Q.	with bringing it to the level that you
6		want it?
7	Α.	No.
8	Q.	Would you acknowledge that all of that costs
9		money?
10	Α.	Yes.
11	Q.	Okay. Have you spent any money whatsoever on
12		maintaining or taking care of the I-65
13.	·	property?
14	A.	No.
15	Q.	Look at paragraph number 21.
16	A.	Okay.
L7	Q.	Is it your contention that there have been
L 8		profits made and that there are dividends to
19		be distributed which have not been
20	•	distributed?
21	A.	I don't know.
22	Q.	Do you know of any fact that would indicate
3		that I-65 has made a profit?

DUNN, KING & ASSOCIATES

Montgomery, Alabama
(334) 263-0261 or (800) 359-8001

# EXHIBIT "2"

**Deposition of Richard Dorsey** 

1	IN THE UNITED STATES DISTRICT COURT
2	FOR THE MIDDLE DISTRICT OF ALABAMA
3	NORTHERN DIVISION
4	
5	DONNA DORSEY DAVIS,
·6	Plaintiff,
7	vs. CASE NO. 2:06CV766-MHT
8	RICHARD M. DORSEY, etc., and CD&O, LLC, etc.,
9	Defendants.
10	
11	
12	
13	* * * * * * * * *
14	DEPOSITION OF RICHARD M. DORSEY, taken
15	pursuant to stipulation and agreement before Dee
16	Coker, Registered Professional Reporter and
17	Commissioner for the State of Alabama at Large,
18	in the Law Offices of Cleveland & Colley, 744
19	East Main Street, Prattville, Alabama, on Monday,
20	March 12, 2007, commencing at approximately
21	10:03 a.m.
22	* * * * * * * * *
23	

DUNN, KING & ASSOCIATES Montgomery, Alabama

	against Donna individually. Can you help me
	with why TD&O has anything to do with this?
A.	TD&O has been one of the companies that I've
,	borrowed money for, for I-65.
Q.	Oh, I got you.
A.	To pay property taxes, maintenance, upkeep.
Q.	Okay. Got you. And will that show
	here's it's all marked up, so I almost
	hate to use it, but this was furnished at a
,	point. I think Ms. Perry did it. It was
	furnished to my client. Forget all the
	writing. She took notes. It's the only copy
	she had. So will that show on here? It's
	got loans Dorsey Motors, Dorsey Motors. I
	haven't studied it. I didn't see TD&O on
	here.
A.	I haven't seen the document.
Q.	Okay. Well, we'll go to that well, we may
	as well go to it, because I'm trying to
•	ascertain how TD&O I didn't know they
	were, because you told me it's Taylor. So
	we'll go ahead and use this document.
	Q. A. Q.

MR. ROBERTS: Now, I don't have a clean

- A. That's correct.
- Q. All right. Read the rest of that. I've let you read it off the record, but read the rest of it. I just want to be sure, since you weren't sure of that -- and I'm trying not to take a lot of time, but I-65 didn't pay cash but tendered a mortgage. No problem with that, right?
- A. Yes.

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- Q. Yes. She can't read it a head shake.

  Subsequent to the corporation acquiring the real state, there have been ongoing costs, such as property taxes, annual franchise privilege. You don't have a disagreement with that. We have a document that appears to be ongoing costs, correct?
- A. Yes.
- Q. All right. And there were -- as time passed, you don't have any argument that you either paid some of those expenses or put money into the account to pay the expenses, correct?
- A. Correct.
- Q. Okay. That's #9. Following up, we have

from I-65 Properties to Dorsey Motor Sales 1990 Promissory Note October 1,

90-412.B0) (OUR FILE NO. 36067 IN STREET ALABAMA WALTHALL LAW ATTORNEY AT LÄN 141 WEST MAIN : PRATTVILLE, AL GEORGE 205,

# NCIPROMISSORY

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demand OD and payable Due

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¥0 due holder installment become the οĹ shall āny option indebtedness of payment the تد in the full entire in default the and event of d interest at once orthe payable principal Ĭ thereof and

taken this suit notation S Ç such party liable ar, endorser, surety or as to this debt, or any Constitution and Laws of each they whether action, uding a reasonable attorney's fee, whethey any attorney consulted, with reference, er, endorser This note may be declared assignment of protest. of them and they a renewal note such ģ and ٠ ٢٥ anytime general property. any notice or consent or any to date at vency of, ge be extended or against maker, ment, protest. to hold them severally waives exemption under the insolvency to personal or, without notice of. whether of any such party. or abated event of the inso in bankruptcy by presentment, instrument. hereby sever may pay all costs of cothis note, including mortgage other requirements necessary lor secured by a payment interest computed state, ΟĘ of demand, ne parties of this i r, each for himself h thereof, all rights c or of any other st hereon by the holder in the ejudgment against or petition granted severally agree that time of liability terms collected severally waives to any indulgence of severally agree to subject same be colle secme with release and payable Ö hereunder, other The guarantor judgment renewal Alabama, collect all without suit note and the

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DORSEY RICHARD

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Secretary CONNIE

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EXHIBIT

# **EXHIBIT "14"**

Affidavit of Richard M. Dorsey

STATE OF ALABAMA
COUNTY OF AUTAUGA

## AFFIDAVIT OF RICHARD M. DORSEY

Before me, the undersigned authority in and for said County and State, personally appeared Richard M. Dorsey, who is known to me and who being first duly sworn, deposes and says:

"I make this affidavit based upon my own personal knowledge. I am a Defendant in this case and a shareholder in I-65 Properties, Inc. I-65 Properties, Inc. consists of undeveloped real estate located in Elmore County, Alabama. This is real estate my father and I purchased as an alternative to expand our automobile business. At my father's direction, this property was transferred into I-65 Properties, Inc. with my holding 70% of the stock and my sister Donna holding 30% of the stock. We are the only two (2) stockholders of I-65 Properties, Inc. I-65 Properties, Inc. assumed the mortgage on the property as part of the purchase price.

For many years, I-65 Properties, Inc. had no income and within the last few years I have been successful in leasing billboard space on this property. This is the only income the corporation has. Throughout all these years I have personally or through companies which I own made all payments on behalf of the corporation including the mortgage payments to the prior owners of the property, tax payments, insurance payments, accounting expenses and any other costs associated with the corporation. My sister has incurred no expense on behalf of the corporation.

I have provided my sister, either directly or indirectly, with copies of income tax returns prepared by Diamond, Roller, Taunton & Carmichael, P. A. I have also instructed Alan Taunton with Diamond, Roller, Taunton & Carmichael, P. A. to meet with my sister or her attorney and

EXHIBIT

## Case 2:06-cv-00766-MHT-TFM Document 40-5 Filed 04/27/2007 Page 3 of 3 Case 2:06-cv-00766-MHT-TFM Document 5 Filed 09/18/2006 Page 6 of 6

make all books and records of I-65 Properties, Inc. available to them. It is my understanding that they have not availed themselves of this offer."

Further affiant sayeth not.

RICHARD M. DORSEY

SWORN TO and SUBSCRIBED before me this the day of

NOTARY PUBLIC

My Commission Expires on 9/17/2007

# **EXHIBIT "15"**

**Compilation of Expenses Owed** 

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1996	11-Jan	12-Mar	22-Aug .	21-Oct	16-Dec				1997	12-Mar	17-Sep U			-	1998	17-Sep	14-Dec			1999	4-Jan	4-Jan	10-Mar	27-Sep	7-Dec	7-Dec		

See Tax   \$ 110.00   15-Mar   1.40   15-Mar   1.40   10-Jul   1.40   10-Jul   1.40   1.40   10-Jul   1.40   1.40   10-Jul   1.40   1.			-				-	
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Inton         Legal Fees (70%)         \$ 1,400.00           Interstae Property         \$ 1,312.50           Interstae Property         \$ 1,11.29           Interstae Property         \$ 1,200.00           Interstae Property         \$ 1,200.00           Interstae Property         \$ 1,200.00           Interstae Property         \$ 1,645.00           Interstae Property         \$ 1,380.13           Interstae Property         \$ 1,380.00           Interstae Property         \$ 1,380.00           Interstae Property         \$ 1,380.00           Interprety         \$ 1,380.00           Interprety         \$ 1,200.78           Interprety         \$ 1,200.78           Interprety         \$ 1,200.78           Interprety         \$ 1,200.00           Interprety         \$ 1,200.00           Interprety         \$ 1,200.00      <	Faunton	Accounting Serv	65	277.92	14-Jun	Dick Dorsey	<del>(2)</del>	300.00
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Inton         Acct. Fees (70%)         \$ 1,312.50           Property Tax         \$ 835.20           Service Charges         \$ 111.29           Service Charges         \$ 1,407.66           I of Revenue         Privilege Tax         \$ 1,200.00           Bunton         Legal Fees         \$ 1,200.00           I company Tax         \$ 835.20           I comperty Tax         \$ 3,981.33           I of Revenue         PSA Tax Ext.         \$ 1,380.00           I of Revenue         Service Charges         \$ 1,280.00           I of Revenue         Service Charges         \$ 1,210.78           I of Revenue         Service Charges         \$ 1,210.78           I of Revenue <td></td> <td>2</td> <td></td> <td>598.60</td> <td>,</td> <td></td> <td>_</td> <td></td>		2		598.60	,		_	
Property Tax		Acct. Fees (70%)		,312.50			_	
Service Charges       \$ 111.29         venue       Privilege Tax       \$ 1,200.00         Legal Fees       \$ 1,200.00         P O Box Rent       \$ 55.00         Legal Fees       \$ 1,645.00         Property Tax       \$ 835.20         Service Charges       \$ 1,38.13         venue       PSA Tax Ext.       \$ 1,380.00         Review Notes       \$ 4,210.78         P O Box Rent       \$ 4,210.78         P O Box Rent       \$ 4,210.78         P O Box Rent       \$ 4,210.78         P Service Charges       \$ 142.80         Service Charges       \$ 6,746.78		Property Tax	<del>69</del>	835.20				
venue       Privilege Tax       \$ 7,407.66         venue       Privilege Tax       \$ 110.00         Legal Fees       \$ 1,200.00         P O Box Rent       \$ 55.00         Legal Fees       \$ 1,645.00         Property Tax       \$ 835.20         Service Charges       \$ 1,380.00         Review Notes       \$ 4,210.78         Review Notes       \$ 4,210.78         P O Box Rent       \$ 68.00         Property Tax       \$ 835.20         Service Charges       \$ 142.80         Service Charges       \$ 6,746.78		Service Charges	\$	111.29		ئدر		
venue       Privilege Tax       \$ 110.00         Legal Fees       \$ 1,200.00         P O Box Rent       \$ 55.00         Legal Fees       \$ 1,645.00         Property Tax       \$ 835.20         Service Charges       \$ 1,36.13         venue       PSA Tax Ext.       \$ 1,380.00         Review Notes       \$ 4,210.78         r       P O Box Rent       \$ 4,210.78         Property Tax       \$ 835.20         Service Charges       \$ 142.80         Service Charges       \$ 6,746.78				7,407.66			<del>65</del>	7,169.45
venue       Privilege Tax       \$ 110.00         Legal Fees       \$ 1,200.00         P O Box Rent       \$ 55.00         Legal Fees       \$ 1,645.00         Property Tax       \$ 835.20         Service Charges       \$ 1,380.00         Review Notes       \$ 1,380.00         I65 Prop       \$ 4,210.78         P O Box Rent       \$ 68.00         Property Tax       \$ 835.20         Service Charges       \$ 142.80         Service Charges       \$ 6,746.78								
venue         Privilege Tax         \$ 110.00           Legal Fees         \$ 1,200.00           P O Box Rent         \$ 55.00           Legal Fees         \$ 1,645.00           Property Tax         \$ 835.20           Service Charges         \$ 136.13           venue         PSA Tax Ext.         \$ 1,380.00           Review Notes         \$ 1,380.00           I65 Prop         \$ 4,210.78           Property Tax         \$ 835.20           Property Tax         \$ 835.20           Service Charges         \$ 142.80           Service Charges         \$ 6,746.78							_	-
Legal Fees       \$ 1,200.00         P O Box Rent       \$ 55.00         Legal Fees       \$ 1,645.00         Property Tax       \$ 835.20         Service Charges       \$ 136.13         venue       PSA Tax Ext.       \$ 1,380.00         Review Notes       \$ 4,210.78         I65 Prop       \$ 4,210.78         P O Box Rent       \$ 68.00         Property Tax       \$ 835.20         Service Charges       \$ 142.80         Service Charges       \$ 6,746.78		Privilege Tax	<del>69</del>	110.00	14-Mar	Dick Dorsey	<del>69</del>	150.00
P.O Box Rent       \$ 55.00         Legal Fees       \$ 1,645.00         Property Tax       \$ 835.20         Service Charges       \$ 136.13         venue       PSA Tax Ext.       \$ 1,380.00         Review Notes       \$ 4,210.78         r       Property Tax       \$ 68.00         Property Tax       \$ 835.20         Service Charges       \$ 142.80         Service Charges       \$ 6,746.78	& Taunton	Legal Fees			13-Aug	Dick Dorsey	<del>69</del>	1,200.00
Legal Fees       \$ 1,645.00         Property Tax       \$ 835.20         Service Charges       \$ 136.13         venue       PSA Tax Ext.       \$ 1,380.00         Review Notes       \$ 1,380.00         165 Prop       \$ 4,210.78         P O Box Rent       \$ 68.00         Property Tax       \$ 835.20         Service Charges       \$ 142.80         Service Charges       \$ 6,746.78		P O Box Rent	\$	55.00	28-Sep	Dick Dorsey	<del>69</del>	200.00
r Property Tax \$ 835.20 Service Charges \$ 136.13  tof Revenue PSA Tax Ext. \$ 1,380.00 Review Notes \$ 1,380.00 Review Rent \$ 68.00 PO Box Rent \$ 835.20 Property Tax \$ 835.20 Service Charges \$ 142.80	& Taunton	Legal Fees	\$	1,645.00	21-Dec	Dick Dorsey	<del>69</del>	1,700.00
Service Charges       \$ 136.13         Intof Revenue       PSA Tax Ext.       \$ 1,380.00         Review Notes       \$ 1,380.00         165 Prop       \$ 4,210.78         P O Box Rent       \$ 68.00         er       Property Tax       \$ 835.20         Service Charges       \$ 142.80         \$ Service Charges       \$ 6,746.78	ırper	Property Tax	↔	835.20	27-Dec	Dick Dorsey	↔	850.00
## 3,981.33  ## 3,981.33  ## 3,981.33  ## 110.00  ## 110.00  ## 1,380.		Service Charges		136.13				
## 110.00   Review Notes		-		3,981.33			₩.	4,100.00
int of Revenue PSA Tax Ext. \$ 110.00 Review Notes \$ 1,380.00 165 Prop \$ 4,210.78 r. P O Box Rent \$ 68.00 er Property Tax \$ 835.20 Service Charges \$ 142.80		•						
Int of Revenue         PSA Tax Ext.         \$ 110.00           Review Notes         \$ 1,380.00           I65 Prop         \$ 4,210.78           Interview Notes         \$ 4,210.78           Interview Notes         \$ 4,210.78           Interview Notes         \$ 4,210.78           Interview Notes         \$ 88.00           Interview Notes         \$ 835.20           Interview Notes         \$ 142.80           Interview Notes         \$ 6,746.78								:
Review Notes	nent of Revenue	PSA Tax Ext.	↔	110.00	18-Mar	Dick Dorsey	<del>69</del>	110.00
165 Prop	ey e	Review Notes	l	1,380.00	16-Sep	Dick Dorsey	↔	6,000.00
. P O Box Rent \$ 68.00   . Property Tax \$ 835.20   12-Dec   Service Charges \$ 142.80   \$ 6,746.78	ey	165 Prop		4,210.78			 	
Property Tax \$ 835.20 12-Dec Service Charges \$ 142.80 \$ 6,746.78		P O Box Rent	₩.	68.00				
<del>⇔</del> <del>⇔</del>	ırper	Property Tax	↔	835.20	12-Dec	Dick Dorsey	<del>69</del>	00.009
↔		Service Charges	69	. 142.80				
			1 :	6,746.78			₩.	6,710.00
		•				,		

Fax Return

27-Sep Diamond, Roller, Taunton

Regions Bank

15-Sep|Ala Dept of Revenue

27-Sep US Postmaster

Legal Fees Fax Return

12-Mar | Ala Department of Revenue

17-Feb|Diamond, Roller, Taunton

17-Feb Cleveland & Colley

2004

P O Box Rent Property Tax

Legal Fees

Legal Fees PSE Tax

14-Mar|Alabama Department of Revenue

2003

14-May|Diamond, Roller Taunton

14-Mar|Cleveland and Colley

24-Jul|Diamond, Roller Taunton

10-Dec|Wm M "Mike" Harper

Regions Bank

30-Sep U S Postmaster

14-May|Cleveland and Colley

Service Charges **Tax Preperation** 2005 PSE Tax P O Box Rent Property Tax Privilege Tax 22-Nov Diamond, Roller Taunton & Carmic 5-Mar Ala Department of Revenue 15-Sep Ala Department of Revenue Wm M "Mike" Harper 27-Sep U S Postmaster Regions Bank 2005

Owed to Dorsey Motor Sales

Plus Interest

5/6